No. 14,844

In the

United States Court of Appeals

For the Ninth Circuit

COMMODITY CREDIT CORPORATION,
Appellant,

vs.

ROSENBERG BROS. & CO. INC., a Corporation,
Appellee,

and

ROSENBERG BROS. & CO. INC., a Corporation,
Appellant,

vs.

COMMODITY CREDIT CORPORATION,
Appellee.

Petition for Rehearing

MELVILLE EHRLICH
1000 Vermont Ave. N.W.
Washington 5, D. C.

LLOYD W. DINKELSPIEL
EDWARD W. ROSSTON
HELLER, EHRMAN, WHITE & MCAULIFFE
14 Montgomery Street
San Francisco 4, California

Attorneys for Appellee and Cross-Appellant

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

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No. 14,884

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COMMODITY CREDIT CORPORATION,
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Petition for Rehearing

To the Honorable Court of Appeals for the Ninth Circuit and to the Judges thereof:

Rosenberg Bros. & Co. Inc., appellee in the above entitled case (hereinafter referred to as "Rosenberg") respectfully petitions this Honorable Court and the Judges thereof for:

(1) a rehearing in bank of the appeal and cross-appeal from the decision and judgment of the United States Dis-

trict Court made and entered in the above entitled case on May 31, 1955;

OR IN THE ALTERNATIVE

(2) a rehearing before the Honorable Judges of the Court of Appeals for the Ninth Circuit who, on March 17, 1957, rendered the decision and judgment on the appeal and cross-appeal herein, reversing the said United States District Court.

Rosenberg's petition is based upon the following grounds:

I. Throughout Its Opinion the Court Disregarded the Findings of the Trial Court.

As if in complete distrust of the trial court, the Court of Appeals brushed aside and disregarded all the findings of the United States District Court on disputed issues and, in effect, redecided these issues in favor of Appellant. The Court of Appeals acted in this manner despite the presence of ample evidence in the record to support the findings of the United States District Court, and despite the accepted rule of law that great weight should be given to the findings of the trial court, which are presumably correct, and that an appellate court should not ignore these findings, particularly because it is not in a position to judge the credibility of witnesses.

Fed. Rules of Civ. Proced., Rule 52(a);
Walling v. General Industries Co. (1947) 330 U. S. 545, 91 L.Ed. 1088;
Graver Tank & Mfg. Co. v. Linde Air Products Co. (1949) 336 U. S. 271, 93 L.Ed. 672; *aff'd.* 339 U. S. 605, 94 L.Ed. 1097.

It was the trial judge who, in evaluating the testimony of witnesses, had the opportunity to observe and who could and did weigh the apparent malice of the then Secretary of

Agriculture towards Rosenberg and other packers, evidenced by his expressed intent to "teach the packers a lesson" and that the packers "could not buck a four billion dollar corporation" (R. 243-244; 306-309; 447*); the evident fairness of the attitude of S. R. Smith, the Government official in charge of the Fruit and Vegetable Branch, who recommended renegotiation of the packer contracts (Pl. Ex. 50); and the obvious sincerity and thorough understanding of the raisin industry and its problems exhibited by Rosenberg's witness, Dwight Grady.

Why in this case should the established rule of law re acceptance of findings of fact by an appellate court be so completely disregarded? Counsel for petitioner can only conclude that it was the inadequacy of their presentation, written and oral, which permitted this situation to arise. If this is indeed the case, in fairness to petitioner, a rehearing is clearly indicated.

II. The Court Misconstrued Rosenberg's Argument and Erred in Ignoring the Finding of the United States District Court That Rosenberg Had Not "Assumed the Risk" of a Change in Commodity Credit Corporation's Program as Announced September 5, 1947.

In discussing the Secretary's September 5 announcement the Court characterizes Rosenberg's claim as one that the announcement "became part of the contract" (Opinion, p. 4) and that Commodity Credit Corporation (hereinafter referred to as CCC) "agreed not to purchase more than 61,000 tons of raisins during its entire program and moreover that the purchases would be made from processors and packers" (Opinion, p. 6). Rosenberg did make this argument, but only in conection with its first cause of action.

*Reference to the printed record will be made in this manner throughout the petition.

This line of argument was not accepted by the United States District Court; but it decided the case in favor of Rosenberg on the basis of Rosenberg's second cause of action, which was grounded on CCC's *implied* promise not to hinder or prevent Rosenberg's performance. This implied promise does not depend on a theory that the September 5 announcement is "part of the contract," or that CCC "agreed" not to purchase more than 61,000 tons and to purchase from processors and packers.

Professor Corbin has stated the governing legal principle:

> "In any kind of contract, if the right of one party to compensation is conditioned upon the rendition of some service or other performance by him or on his behalf, it is *nearly always* a breach of contract for the other party to act so as to prevent or hinder and delay or to make more expensive the performance of the condition." (Italics added.) 3 Corbin on *Contracts* (1951 Ed.) § 571.

It is only upon proof of exceptional circumstances that the performing party is regarded as having "assumed the risk" of hindrance by the other party to the contract. *Restatement of Contracts,* § 315. The Secretary's September 5 announcement is important only because it bears upon the issue of whether Rosenberg "assumed the risk" of a change in CCC's 1947 raisin purchase program. A finding that Rosenberg did not assume that risk need not be based upon the ground either that the September 5 announcement was an "agreement" by CCC or a "part of the contract." Even if the September 5 announcement is neither an "agreement" nor a "part of the contract," and even if it be regarded as a mere statement of policy, the words of that statement were clear and definite. These words, in the light of the conduct of CCC officials, firmly support the trial court's finding (Finding 44, R. 82) that Rosenberg *did not assume the risk* that its

performance would be hindered by a change in CCC's 1947 raisin program. This is obviously a question of *fact*. As such, the finding of the United States District Court is presumably correct and should not have been ignored by the Court of Appeals.

There is ample evidence in the record to sustain the finding of the United States District Court that Rosenberg did not "assume the risk" of a change in CCC's raisin program as announced September 5, 1947. The September 5 announcement was carefully prepared and was in definite and unequivocal words; it prescribed a definite "maximum" for raisin purchases; it unequivocally stated that CCC would purchase from processors and packers; it also clearly stated that prices would not be maintained "at any given level"; it was the "immediate" announcement of the raisin purchase program contemplated by Docket OC-95a; it was the *only* announcement of CCC's *entire* 1947 raisin purchase program; the tonnage on which calls for bids were issued under Announcements No. 1 and No. 2 exactly equalled the 61,000 ton maximum referred to in the September 5 announcement; contemporary announcements by CCC and Department of Agriculture officials recognized that CCC's raisin purchases had been made "under the program announced by the Department September 5, 1947" (Pl. Ex. 13) and summarized total purchases of dried fruit "since offers to purchase were originally announced by the Department on September 5" (Pl. Ex. 19).

The finding of the United States District Court that Rosenberg did not assume the risk of a change in the program announced September 5 is further supported by statements of the official of the Department of Agriculture in charge of the raisin purchase program. S. R. Smith summarily rejected Rosenberg's requests for change in the pro-

gram as "contrary to the Secretary's statement," declared that the "program as announced" was a substantial contribution to stabilize conditions in the dried fruit industry, and solicited the cooperation of Rosenberg and other packers in making it a success (Pl. Ex. 8).

That the Court of Appeals misconstrued the significance of the September 5 announcement is evidenced in its very opening statement of the facts, which begins with the date of September 10, 1947, the day on which Commodity Credit Corporation, hereinafter referred to as "CCC" issued its first invitation to bid on a part of the maximum total of raisins covered by the Secretary's September 5 announcement. The Court of Appeals makes no reference to the September 5 announcement until a point much later in its opinion when its discussion is more of an explanation why it chose to ignore the announcement. This treatment of the September 5 announcement is completely unwarranted in view of the fact that the Secretary not only released the announcement to the press but sent copies to the industry, including Rosenberg (Finding 10, R. 69-70); that both the Secretary and CCC intended packers and processors to rely on the announcement and that Rosenberg did rely on it (Finding 13, R. 70-71; Findings 18-19, R. 72-73).

III. The Court Misapprehended the Facts and Made an Error of Law When It Ruled That Rosenberg Had No Election to Acquire Raisins for Its CCC Contracts After CCC's Breach of Contract on October 14, 1947.

The Court's opinion, relying on the rule of mitigation of damages, states that Rosenberg cannot recover from CCC because Rosenberg's damages (resulting from its acquisition of raisins for its CCC contracts after CCC's breach) were a consequence of Rosenberg's active and unreasonable enhancement of its damages (Opinion, pp. 7-13). This appli-

cation of the rule of mitigation of damages is based on a misapprehension of fact and is an error of law.

A. THE COURT MISAPPREHENDED THE FACTS WHEN IT STATED THAT ROSENBERG WOULD HAVE SUFFERED NO DAMAGE HAD IT BOUGHT NO RAISINS FOR ITS CCC CONTRACTS AFTER CCC'S BREACH.

Had Rosenberg withdrawn from CCC's 1947 purchase program by refusing to deliver after CCC's breach and by not purchasing raisins from growers to fulfill its CCC contracts, the consequences would have been more disastrous than they were. Rosenberg's ability to obtain raisins from growers for its business depends upon the growers' well-being and upon a continuing relationship with growers. Rosenberg could not withdraw from the market in one year and expect to maintain its grower relationships. The continuance of good grower relationships required its participation in CCC's 1947 raisin purchase program. Had Rosenberg not bid on CCC's calls, or had Rosenberg not purchased raisins for its CCC contracts, growers who customarily deal with Rosenberg would have been caught with a large raisin surplus in their hands, or would have been forced to seek other outlets for their 1947 crop. This would seriously have prejudiced Rosenberg's supply position *vis-a-vis* its growers in future crop years. A consequential and equally serious effect of Rosenberg's complete withdrawal from its CCC contracts in mid October would have been complete demoralization of the raisin market. Rosenberg's participation in CCC's 1947 raisin program was necessary to assure its growers of a return on their raisins, and in turn to protect Rosenberg's large investment in dried fruit facilities. Rosenberg was too big a factor in the industry, and its CCC commitment was too large to allow it to "walk away" from its CCC contracts as the Court suggests, without disastrous consequences (R. 199-200; 208).

B. THE COURT MADE AN ERROR OF LAW IN APPLYING THE PRINCIPLE OF MITIGATION OF DAMAGES TO THE FACTS OF THIS CASE.

CCC's breach of its contract with Rosenberg gave Rosenberg an election of remedies: (1) to rescind; (2) to treat the contract as broken and sue at once for damages; or (3) to treat the contract as binding, continue performance, and sue for damages for breach. An innocent party to a contract *may* stop his performance upon breach by the other party, but he is not *required* to do so. He may continue to perform, insofar as he is permitted, and then claim damages for the breach of contract.

Winans v. Sierra Lumber Co. (1884) 66 Cal. 61, 4 Pac. 952;

Bu-Vi-Bar Petroleum Corp. v. Krow (C.C.A. 10, 1930) 40 F.2d 488, 490;

2 *Fed. Law of Contracts,* § 429;

5 *Corbin on Contracts* (1951 Ed.) § 1105, p. 469.

The decision of the Court of Appeals, rendered on March 7, 1957, requires the injured party to a contract, at its peril, to decide whether the wrongdoer's breach is so substantial as to allow it to rescind, or whether it is so insubstantial as not to excuse performance, but merely to give rise to a claim for damages. The law is not so harsh. The rule of mitigation of damages, which requires the innocent party to cease performance upon breach by the other party to a contract, applies only in case the other party *repudiates* the contract or breaches the contract in a manner tantamount to a *repudiation.* It has no application to the facts of the subject case, where CCC not only failed to repudiate its contract with Rosenberg but, indeed, *insisted on performance* after its breach. The rule is aptly stated by the Court in *Bu-Vi-Bar Petroleum Corp. v. Krow, supra* at page 492:

"The situation of an injured party, where there has been a breach which does not indicate an intention to repudiate the remainder of the contract, and the situation of the injured party where there has been a total renunciation of the contract, differs in important particulars. In the former case, the injured party has a continuing election either of continuing performance or ceasing to perform. * * * Any act indicating an intent to continue will operate as a conclusive election. * * * On the other hand, where the contract is wholly renounced, there can be no real election between continuation and cessation of performance * * * because, after notice of renunciation the other party cannot go on and complete an executory contract and sue for any increased damages resulting from his continuing to perform".

Accord: Williston, *Contracts* (Rev. Ed.) § 1298.

The Court of Appeals correctly states the legal principle which prevents an injured party from continuing performance and increasing its damage where the other party *renounces* or *repudiates* a contract (Opinion, pp. 10-12). It errs, however, in applying this principle to the facts of the subject case. CCC at no time renounced or repudiated its contract with Rosenberg. At all times it *repeatedly* and *continuously* insisted on Rosenberg's performance. The United States District Court so found (Finding 38, R. 79-80). CCC's insistence on performance with knowledge of Rosenberg's short position (Finding 21, R. 73; Finding 37, R. 79), indeed, was insistence that Rosenberg purchased the raisins for its CCC contracts.

Although the Court cites the *Zimmerman* case as one not involving anticipatory repudiation (Opinion p. 12), closer examination of the facts of the *Zimmerman* case discloses that the wrongdoer did *repudiate* its contract by refusing all future deliveries under a contract calling for deliveries over

a period of time. *Capitol Paper Box Inc. v. Belding Hosiery Mills Inc.,* 350 Ill. App. 68, 111 N.E. 2d 858 (Opinion, p. 13) is not a case involving *performance* after repudiation. It considers a claim for damages based on lost profits on the *unperformed* portion of a contract broken by one party's deliberate insistence on the use of new materials for paper boxes, not specified in the contract and so expensive that the manufacturer would have lost money. The court's discussion of the principle here in issue clearly mentions *repudiation* of contract by the wrongdoer. Moreover, the deliberate insistence on materials far superior to those specified was tantamount to *repudiation* since both parties knew performance with such materials was economically impossible. The *Bear Cat Mining Co.* case (Opinion, p. 13) is merely a general illustration of the doctrine requiring the innocent party to avoid enhancement of damages after *repudiation* by the other party and does not involve continued performance of a contract after a breach *not* tantamount to repudiation.

The fraud cases cited by the Court (Opinion, p. 12) illustrate an entirely different principle of law from that involved in the subject case. Performance of a contract with knowledge of *fraud in procurement,* which renders it unenforceable, is quite distinguishable from performance after a *breach* of contract not tantamount to repudiation.

IV. The Decision of This Court Is Based on a Misapplication of Law in That the Court Erred in Applying the Parol Evidence Rule to Avoid Implication of a Contract by CCC Not to Hinder Rosenberg's Performance or Render It More Expensive.

A. THE PAROL EVIDENCE RULE APPLIES WHEN THE "CONTRACT" HAS BEEN IDENTIFIED, BUT HAS NO APPLICATION IN DECIDING WHICH DOCUMENTS CONSTITUTE THE "CONTRACT."

The Court wrongly invoked the Parol Evidence Rule (Opinion, p. 5) as a ground for excluding consideration of the September 5 announcement. From the standpoint of

Rosenberg's first cause of action, based on an express contract, the true issue is *identification* of the contract: whether the September 5 announcement is a part of the contract, not whether it varies the meaning of an identified contract.

The contracts here in question are not single documents, easily identifiable, but consist of a series of communications, *viz.* the September 5 announcement of CCC's entire program (Pl. Ex. 4), announcements calling for bids on parts of the maximum quantity included within the September 5 announcement (Pl. Ex. 9, 14), mimeographed bid forms filed by Rosenberg in response to the foregoing, including PMA 100, a printed sheet of standard contract conditions (Pl. Ex. 10, 15), and CCC's telegraphic acceptances of Rosenberg's bids (Pl. Ex. 11, 12, 16). CCC's telegraphic acceptances of Rosenberg's mimeographed bids were merely final and formal assents and do not preclude the existence of a term of the "contract" in earlier documents, such as the September 5 announcement.

1 Corbin on *Contracts* (1950 Ed.) §§ 22, 31;

Ottney v. Finnie (1935) 5 C.A. 2d 356, 42 P.2d 714 (printed prospectus regarded as part of the contract).

Consideration of whether the September 5 announcement is one of the contract documents is not precluded by the Parol Evidence Rule, which applies only *after* identification of the contract documents.

B. THE PAROL EVIDENCE RULE HAS NO APPLICATION TO THE THEORY ON WHICH THE UNITED STATES DISTRICT COURT DECIDED THE SUBJECT CASE.

The United States District Court found for Rosenberg on the theory that CCC had violated its *implied* contract not to hinder or prevent Rosenberg's performance of its CCC contract (Rosenberg's second cause of action). The Parol

Evidence Rule is completely irrelevant to the existence of such an implied contract. *Generally, and in most situations* a contract not to hinder performance or render performance by the other party more expensive will be *implied as a matter of law* from the mere fact that a contract calling for performance by the other party has been executed. No additional evidence is required. The implication of such a contract is not regarded as a variation of the terms of the basic contract and is not a parol evidence problem.

3 Corbin on *Contracts* (1951 Ed.) § 571; 4 *Ibid.*, § 947.

The principle has been expressed in these words:

> "In the case of every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other from carrying out the agreement on his part."
>
> *Patterson v. Meyerhofer* (1912) 97 N.E. 472, 204 N.Y. 96.

In the usual case, where the risk of hindrance is not "naturally and properly to be anticipated" hindrance is a breach of the implied contract. On the other hand, there must be affirmative proof that "under the terms of the contract or customs of the business" the action of the promissor is permissible in the rare situations in which there is no liability for breach of such an implied undertaking.

Williston, *Contracts* (Rev. Ed.) § 1293A.

Parol evidence may be a problem in the "rare" case but it is irrelevant to the "usual" situation which the trial court found here (Finding 44, R. 82).

V. This Court Committed Error When It Ignored the Findings of the United States District Court on the Issue of Waiver.

The United States District Court found that the exchange of telegrams and telephone calls between Rosenberg and

CCC in the period January 26-29, 1948 related merely to *delivery* arrangements, and that Rosenberg had neither expressly nor impliedly waived its rights to claim damages by such exchange (Finding 39, R. 80), or by its subsequent shipment of raisins to CCC, or by acceptance of the contract price for such shipment (Finding 41, R. 80-81).

Waiver is a matter of fact. *Federal Rules of Civ. Proced.,* Rule 8 (c); 4 *Cyc. Fed. Proced.* (2d Ed.) 643. There was substantial evidence to uphold the findings of the United States District Court that Rosenberg had not waived its rights to claim damages. The Court of Appeals should not have ignored these findings in its discussion of the issue of waiver (Opinion pp. 13-14). The appeal court's discussion of the legal principles of waiver presupposes facts other than those in the subject case. Both the *Early & Daniel Co.* case and the *Willard, Sutherland & Co.* case (cited on p. 14 of the Court's Opinion) involved delivery of quantities in excess of those specified in a contract and acceptance of payment at the contract price by the contractor making excessive delivery. Neither case was concerned with a claim for damages for *breach of contract,* but involved merely claims for additional payments which as a matter of fact had been waived. In the *Francis* case (Opinion p. 13), the court found that a contractor with the United States had no contractual right to cut wood inside a military reservation for delivery to the United States; and after making this statement, continued to express its opinion by way of *dictum* that even if the contractor had a contractual right to cut wood inside the military reservation, it had, as a matter of fact, waived this right by *acquiescing* in the orders of the military authorities to cut wood elsewhere and by delivering receipts in full and accepting payment. This brief discussion of the cited cases illustrates that in every one of them the

court found waiver *as a matter of fact*. In the subject case, the United States District Court found as a matter of fact that Rosenberg had neither expressly nor impliedly waived its right to claim damages (Findings 39, 41, R. 80-81).

The Court of Appeals ignored another finding of the United States District Court when it stated (Opinion p. 14):

> "There was, in fact, no disputed claim on Rosenberg's part, which was advanced by it or recognized by the Government, when Rosenberg performed the contract."

Sharply contrasting with this observation is the fact found by the United States District Court (Finding 38, R. 79-80), that Rosenberg *continually* and *consistently* from and after October 14, 1947, pressed its claim for renegotiation of price to a level which would enable it to escape loss on its CCC contracts. Rosenberg's claim originally took the form of a request for price renegotiation rather than for legal damages because it was being pressed at an administrative level rather than in the courts. This suit is the logical extension of CCC's refusal of Rosenberg's claim for price renegotiation, and is the *identical* claim originally made to CCC. CCC was well aware of Rosenberg's claim at the time it accepted delivery under Rosenberg's contracts. The Chief of the Fruit and Vegetable Branch had, prior to this time, reviewed the situation and recommended price renegotiation to the Secretary of Agriculture. In his summary of the facts (Pl. Ex. 50), he stated that claims for renegotiation of price had been received by CCC from 10 of the 13 contracting processors (including Rosenberg).

A further misapprehension of fact by the Court of Appeals is found in its statement (Opinion p. 14) that at the time of the January 1948 exchange between CCC's contracting officer, Allmendinger, and Rosenberg's representative, Grady, the Government "rejected" Rosenberg's attempt

to reserve its right to assert a claim against CCC. Such was not the fact. Allmendinger lacked authority either to accept or reject Grady's proposed reservation of right. He was not concerned with compromise of Rosenberg's claim but only with *shipment,* and he told Grady that in so many words (R. 270, 617-618). Grady specifically told Allmendinger that he did not intend, by agreeing to ship, to waive Rosenberg's claim (R. 276-277). In the light of this evidence the Court of Appeals should not have overturned the finding of the United States District Court that Rosenberg had *not* waived its claim against CCC.

VI. The Court Erred in Holding That Rosenberg's Completion of Standard Payment Vouchers, Certifying That the Bills Presented Were Correct and Just, and Acceptance of the Contract Price After Performance, Amounted to a Waiver of Its Right to Claim a Further Sum.

A right of damages for breach of contract is not waived by accepting payment at the contract price and completion of a standard Government voucher stating that the bills presented are "correct and just". The money paid by CCC to Rosenberg after delivery of Rosenberg's raisins in 1947 was justly owing to Rosenberg, and the only issue before the court was whether or not CCC was liable to Rosenberg in an *additional* sum. There was no way in which Rosenberg could collect the sum admittedly due it without completing the standard payment vouchers. Under such circumstances, use of the vouchers does not constitute a waiver of Rosenberg's claim to an additional sum *Lundstrom v. United States* (D. Ore., 1941), 53 Fed. Supp. 709, 711, *aff'd.* (C.C.A. 9, 1943) 139 F.2d 792 is a Ninth Circuit case directly in point.

See also, *Blair v. United States* (C.C.A. 8, 1945), 147 F.2d 840, *mod. in other respects* (C.C.A. 8, 1945) 150 F.2d 676.

VII. The Court Is Under a Misapprehension of Fact as to the Time When Rosenberg Acquired Raisins to Meet Its CCC Commitments.

The Court states that Rosenberg decided to make delivery on its CCC contracts in January 1948, since the price of raisins had dropped, and "it would be enabled to purchase raisins at the lower prices, and fulfill its government contracts" (Opinion p. 3); and again, that Rosenberg "commenced" to purchase raisins to fulfill its CCC contracts only in the latter part of December 1947 (Opinion p. 8). It is a matter of undisputed and irrefutable fact that by January 1948, Rosenberg had already acquired all, or a substantial portion, of the raisins which it delivered to CCC. Considering only Rosenberg's *closed* contract acquisitions of 1947 crop raisins, there is undisputed evidence that from January 1948 until the *end* of the 1947 crop season, long after Rosenberg's CCC shipments were complete, Rosenberg acquired only approximately 3,500 tons of raisins. Even if it be assumed that the last raisins acquired under *closed* contract by Rosenberg in the 1947 crop season were acquired for its CCC contract (a contention which Petitioner strenuously opposes) it would be necessary to include closed contract acquisitions in the month of December 1947 to accumulate enough raisins to cover Rosenberg's CCC commitments (Pl. Ex. 48). The assumption that Rosenberg delivered the raisins last acquired in 1947 to CCC is patently false since Rosenberg was also supplying its other customers in this same period; and this fact necessarily pushes back even further the date on which Rosenberg acquired raisins for delivery to CCC.

It is also an undisputed fact that Rosenberg purchased raisins under *open* contracts as well as under closed contracts, and that its open contract commitments to take delivery of the raisins and its open contract right to posses-

sion of the raisins was just as firm and enforceable as its corresponding commitment and right under its closed contracts (Pl. Ex. 52).*

When Rosenberg's *open* contract acquisitions, as well as its closed contract acquisitions, are examined, it is even more obvious that Rosenberg did in fact acquire raisins for its CCC contracts long before January 1948. By November 25, 1947, Rosenberg had acquired several thousand tons *more* raisins than its total non-CCC sales to date, and by that date Rosenberg had acquired practically enough raisins to fill all of its non-CCC commitments for the *entire* 1947 crop year (Def. Ex. AC, Col. 10, 18). This undisputed record of acquisitions clearly demonstrates that Rosenberg was buying raisins in 1947 at a rate far greater than would have been warranted by its non-CCC sales alone. It was making provision both for its CCC commitments and for its other sales contracts as rapidly as it could under the then existing market conditions.

SUMMARY

For the foregoing reasons, and because of this Honorable Court's misapprehension of certain basic facts and misapplication of the law to the actual facts of the subject case, as found by the United States District Court, Petitioner prays that this Court grant a rehearing in bank, or in the

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*Rosenberg's open price contract includes provisions identical with its closed price contract in the following words:

"This contract is intended and understood by both parties to pass title to said fruit, and to constitute an absolute sale. * * *

"Buyer shall have the right to the possession of any fruit sold as and when the same shall be dried and cured, and may at any time thereafter enter upon the premises where such fruit is, and remove the same * * *; but nothing herein contained shall affect Seller's obligation to deliver such fruit as herein provided."

alternative a rehearing before the Honorable Judges comprising the panel which reversed the decision of the United States District Court.

Respectfully submitted,

Melville Ehrlich
1000 Vermont Ave. N.W.
Washington 5, D. C.

Lloyd W. Dinkelspiel
Edward W. Rosston
Heller, Ehrman, White & McAuliffe
14 Montgomery Street
San Francisco 4, California

Attorneys for Appellee and Cross Appellant.